

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 MELINDA CUNNINGHAM,) NO. CV 17-4852-E
12 Plaintiff,)
13 v.) **MEMORANDUM OPINION**
14 COMMISSIONER OF SOCIAL SECURITY)
ADMINISTRATION,) **AND ORDER OF REMAND**
15)
16 Defendant.)

18 Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS HEREBY
19 ORDERED that Plaintiff's and Defendant's motions for summary judgment
20 are denied and this matter is remanded for further administrative action
21 consistent with this Opinion.

PROCEEDINGS

25 Plaintiff filed a complaint on June 30, 2017, seeking review of the
26 Commissioner's denial of disability benefits. The parties filed a
27 consent to proceed before a United States Magistrate Judge on August 2,
28 2017. Plaintiff filed a motion for summary judgment on

1 November 27, 2017. Defendant filed a motion for summary judgment on
2 December 8, 2017. The Court has taken the motions under submission
3 without oral argument. See L.R. 7-15; Order, filed July 6, 2017.

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5 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

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7 Plaintiff asserts disability since December 16, 2011, based on
8 several alleged impairments (Administrative Record ("A.R.") 42-470).
9 Plaintiff testified that her impairments cause her to suffer pain and
10 limitations of allegedly disabling severity (A.R. 43-50).

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12 On March 14, 2016, an Administrative Law Judge ("ALJ") found
13 Plaintiff has severe physical impairments but retains the residual
14 functional capacity to perform a limited range of medium work (A.R. 22).
15 With regard to Plaintiff's testimony concerning her alleged symptoms,
16 the ALJ stated only:

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18 After careful consideration of the evidence, the undersigned
19 finds that the claimant's medically determinable impairments
20 could reasonably be expected to cause the alleged symptoms;
21 however, the claimant's statements concerning the intensity,
22 persistence and limiting effects of these symptoms are not
23 entirely credible for the reasons explained in this decision.
24 In terms of the claimant's alleged physical impairments, the
25 undersigned limits the claimant to medium exertional work with
26 occasional operation of foot controls. The claimant's
27 subjective reported history cannot substitute for the
28 objective medical evidence contained in the record, which

1 provides a more accurate longitudinal history of the
2 claimant's conditions. Turning to the medical evidence, the
3 objective findings in this case fail to provide support for
4 the claimant's allegations of disabling symptoms and
5 limitations. More specifically, the medical findings do not
6 support the existence of limitations greater than the above
7 listed residual functional capacity (A.R. 24).

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9 The ALJ found Plaintiff not disabled (A.R. 26-27). The Appeals
10 Council denied review (A.R. 8-10).

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12 **STANDARD OF REVIEW**

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14 Under 42 U.S.C. section 405(g), this Court reviews the
15 Administration's decision to determine if: (1) the Administration's
16 findings are supported by substantial evidence; and (2) the
17 Administration used correct legal standards. See Carmickle v.
18 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue, 499
19 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner
20 of Social Sec. Admin., 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial
21 evidence is "such relevant evidence as a reasonable mind might accept as
22 adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389,
23 401 (1971) (citation and quotations omitted); see Widmark v. Barnhart,
24 454 F.3d 1063, 1066 (9th Cir. 2006).

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DISCUSSION

When an ALJ finds that a claimant's medically determinable impairments reasonably could be expected to cause the symptoms alleged, the ALJ may not discount the claimant's testimony regarding the severity of the symptoms without making "specific, cogent" findings, supported in the record, to justify discounting such testimony. Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995); see also Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990); Varney v. Secretary, 846 F.2d 581, 584 (9th Cir. 1988).¹ Generalized, conclusory findings do not suffice. See Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004) (the ALJ's credibility findings "must be sufficiently specific to allow a reviewing court to conclude the ALJ rejected the claimant's testimony on permissible grounds and did not arbitrarily discredit the claimant's testimony") (internal citations and quotations omitted); Holohan v. Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001) (the ALJ must "specifically identify the testimony [the ALJ] finds not to be credible and must explain what evidence undermines the testimony"); Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996) ("The ALJ must state specifically which symptom testimony is not credible and what facts in the record lead to that conclusion."); see also Social Security Ruling 96-7p, superseded, Social Security Ruling 16-3p (eff.

¹ In the absence of a finding of "malingering," or at least evidence of "malingering," most recent Ninth Circuit cases have applied the "clear and convincing" standard. See, e.g., Brown-Hunter v. Colvin, 806 F.3d 487, 488-89 (9th Cir. 2015); Ghanim v. Colvin, 763 F.3d 1154, 1163 n.9 (9th Cir. 2014); Ballard v. Apfel, 2000 WL 1899797, at *2 n.1 (C.D. Cal. Dec. 19, 2000) (collecting cases). In the present case, the ALJ's findings are insufficient under either standard, so the distinction between the two standards (if any) is academic.

1 || March 28, 2016).²

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3 In the present case, the only reasons stated by the ALJ as reasons
4 to discount Plaintiff's testimony regarding the severity of her symptoms
5 concern "the objective medical evidence contained in the record . . .
6 the objective findings in this case . . . the medical findings . . ."
7 (A.R. 24).

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9 A lack of objective medical evidence fully supporting the alleged
10 severity of a claimant's symptomatology "can be a factor" in rejecting
11 a claimant's credibility, but cannot "form the sole basis." See Burch
12 v. Barnhart, 400 F.3d 676, 681 (2005). Therefore, the alleged lack of
13 supporting objective medical evidence cannot justify the ALJ's
14 credibility determination in the present case. See id. To the extent
15 the Defendant may attempt to argue other reasons to attempt to justify
16 the ALJ's credibility determination, the Court cannot uphold the
17 determination on the basis of such other reasons. See Pinto v.
18 Massanari, 249 F.3d 840, 847 (9th Cir. 2001) (the court "cannot affirm
19 the decision of an agency on a ground that the agency did not invoke in

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² Social Security Rulings ("SSRs") are binding on the
22 Administration. See Terry v. Sullivan, 903 F.2d 1273, 1275 n.1
23 (9th Cir. 1990). The Court need not decide whether SSR 16-3p
24 applies retroactively to administrative proceedings prior to
March 28, 2016, since the appropriate analysis in the present
case would be substantially the same under either SSR. See R.P.
25 v. Colvin, 2016 WL 7042259, at *9 n.7 (E.D. Cal. Dec. 5, 2016)
26 (observing that only the Seventh Circuit has issued a published
decision applying Ruling 16-3p retroactively, and concluding that
Ruling 16-3p "implemented a change in diction rather than
substance") (citations omitted); see also Trevizo v. Berryhill,
27 871 F.3d 664, 678 n.5 (9th Cir. 2017) (suggesting that SSR 16-3p
28 "makes clear what our precedent already required").

1 making its decision"); cf. Trevizo v. Berryhill, 871 F.3d at 682 n.10
2 (9th Cir. 2017) (a finding in a section of the ALJ's decision other than
3 the section addressing the claimant's testimony cannot properly be
4 considered to have been a credibility finding).

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6 Because the circumstances of this case suggest that further
7 administrative review could remedy the ALJ's errors, remand is
8 appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011); see
9 Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003) ("Connett")
10 (remand is an option where the ALJ fails to state sufficient reasons for
11 rejecting a claimant's excess symptom testimony); but see Orn v. Astrue,
12 495 F.3d 625, 640 (9th Cir. 2007) (citing Connett for the proposition
13 that "[w]hen an ALJ's reasons for rejecting the claimant's testimony are
14 legally insufficient and it is clear from the record that the ALJ would
15 be required to determine the claimant disabled if he had credited the
16 claimant's testimony, we remand for a calculation of benefits")
17 (quotations omitted); see also Ghanim v. Colvin, 763 F.3d at 1166
18 (remanding for further proceedings where the ALJ failed to state
19 sufficient reasons for deeming a claimant's testimony not credible);
20 Garrison v. Colvin, 759 F.3d 995, 1021 (9th Cir. 2014) (court may
21 "remand for further proceedings, even though all conditions of the
22 credit-as-true rule are satisfied, [when] an evaluation of the record as
23 a whole creates serious doubt that a claimant is, in fact, disabled");
24 Vasquez v. Astrue, 572 F.3d 586, 600-01 (9th Cir. 2009) (a court need
25 not "credit as true" improperly rejected claimant testimony where there
26 are outstanding issues that must be resolved before a proper disability
27 determination can be made); see generally INS v. Ventura, 537 U.S. 12,
28 16 (2002) (upon reversal of an administrative determination, the proper

1 course is remand for additional agency investigation or explanation,
2 except in rare circumstances).³

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4 **CONCLUSION**

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6 For all of the foregoing reasons,⁴ Plaintiff's and Defendant's
7 motions for summary judgment are denied and this matter is remanded
8 for further administrative action consistent with this Opinion.

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10 LET JUDGMENT BE ENTERED ACCORDINGLY.

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12 DATED: December 22, 2017.

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14 /s/

15 CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

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21 ³ There are outstanding issues that must be resolved
before a proper disability determination can be made in the
present case. For example, it is not clear whether the ALJ would
be required to find Plaintiff disabled for the entire claimed
period of disability even if Plaintiff's testimony were fully
credited. See Luna v. Astrue, 623 F.3d 1032, 1035 (9th Cir.
2010).

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25 ⁴ The Court has not reached any other issue raised by
Plaintiff except insofar as to determine that reversal with a
directive for the immediate payment of benefits would not be
appropriate at this time. "[E]valuation of the record as a whole
creates serious doubt that [Plaintiff] is in fact disabled."
See Garrison v. Colvin, 759 F.3d at 1021.